IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Chamber Summons No. 296 of 2006

in
Suit no. 3320 of 1985

RELIANCE CONSULTANCY SERVICES LTD. ... Plaintiff
V/S
METRO PALUTAN INVESTMENT AND ORS. .. Defendants

Mr. M.L. Palan i/b. DAVE AND CO., for plaintiff
None for defendants

CORAM: **D.G. KARNIK J.**

DATE: February, 5, 2007

ORAL ORDER

1. This Chamber Summons is taken out by the plaintiff seeking exemption, under Order 22 Rule 4 (4) of the Code of Civil Procedure (for short the CPC), from substituting or bringing on record the legal representatives of the deceased defendant no.4 and also for an amendment of the plaint to change the name of the plaintiff.

2. As regards the prayer for amendment of name the plaintiff has pleaded that the name of the plaintiff company was changed subsequent to the filing of the suit. A copy of the

fresh certificate of incorporation issued by the Deputy Registrar of the Companies showing the amendment in the name is annexed to the Chamber Summons. In the circumstances I see no reason for not allowing the amendment of the plaint to change the name of the plaintiff.

3. As regards the prayer for exemption from bringing on record the legal representatives of the deceased defendant no.4, it may be noted that the defendant no. 4 died prior to 2nd September 2005. On two occasions i.e., on 2nd September and 16th December 2005 time was sought by the plaintiff for bringing the legal representative/s of the deceased defendant no. 4 on record. As no steps were taken even thereafter for bringing the legal representatives of the deceased defendant no.4, by an order dated 13th December 2006 this court dismissed the suit as abated as against the defendant no.4. Now, by this Chamber Summons, the plaintiff seeks an order of exemption from bringing the heirs of the deceased defendant no.4 on record.

4. Counsel for the plaintiff submitted that an application for exemption for bringing on record the heirs of the defendant, who has not filed a written statement, can be at any time even after an order of abatement is passed by the court. In support of his submission he relied upon the decision of a Division Bench of the Patna High Court in Md. S. Imam vs.

Rai Bharat Kumar, reported in AIR 2000 PATNA 321 and a decision of a Single Judge of the Allahabad High Court in Mohammad Mustaqeem and ors. vs. Aftab Ahmad, reported in AIR 1983 ALLAHABAD 368. Counsel for the plaintiff also pointed out that the original defendant no.4, though served, had not appeared and had not filed a written statement. He, therefore, submitted that under the amended sub rule 4 of Rule 4 of Order 22 of CPC this was a fit case for granting exemption for bringing the heirs of the deceased defendant no.4 on record.

5. Rule 4(1) of Order 22 of the CPC says that where one of two or more defendants dies and the right to sue does not survive against the surviving defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit. Article 121 of the Limitation Act prescribes a period of 90 days for making an application for bringing on record the legal representatives of the deceased on record. In case the plaintiff fails to bring the legal representatives of the deceased defendant on record within the period prescribed, the suit against the deceased defendant stands abated although the abatement can be set aside on an application made within 60 days of such abatement (article 121 of the

Limitation Act). Prior to the year 1976 there was no provision in the CPC for exempting the plaintiff of the requirement of bringing on record the legal representatives of the deceased defendant. However by Act No. 104 of 1976, sub rule 4 and 5 were added in Rule 4 of Order 22 of the CPC.

6. Sub Rule 4 of Rule 4 of Order 22 CPC reads thus:

> (4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

Under sub Rule 4 of Rule 4 of Order 22 of the CPC the court, in its discretion, is empowered to exempt the plaintiff from the necessity of substituting the legal representatives of a deceased defendant who has failed to file a written statement or who having filed it has failed to appear and contest the suit at the hearing. Where the court exempts a plaintiff from

bringing on record the legal representatives of a deceased defendant the judgment that may be passed in the suit may be pronounced against the deceased defendant notwithstanding his death and shall have the same force and effect as if it has been pronounced before the death took place. It may be noted that sub rule 4 does not say that in every case where the deceased defendant had not filed the written statement or after having filed the written statement had failed to contest the suit, the plaintiff would be exempted from the necessity of substituting the legal representatives. It only permits a plaintiff to make a request to the court, seeking exemption and the court, exercising judicial discretion, can grant such exemption. Needless, to say that the discretion is to be exercised by the court judicially for granting or refusing to grant the exemption as requested by the plaintiff.

7. In Md. S. Imam vs. Rai Bharat Kumar and ors., (supra) a Division Bench of the Patna High Court held that an application for exemption to bring the heirs of the deceased defendant on record under sub Rule 4 of Rule 4 of Order 22 of the CPC could be made at any stage, that is, even after the abatement had taken place or even after the court had passed a formal order noting that the suit had abated. In Mohammad Mustaqeem and ors. vs. Aftab Ahmad and ors., (supra) a Single Judge of the Allahabad High Court has also

taken a similar view and has held that an application for exemption under sub Rule 4 of Rule 4 of Order 22 could be moved even after abatement had taken place, that is, after the expiry of 90 days of the death. No decision was cited of any other High Court taking a contrary view.

8. Respectfully following the aforementioned decisions of the Patna and Allahabad High Courts I hold that an application under sub Rule 4 of Rule 4 of Order 22 can be moved even after the expiry of the period of 90 days of the death, that is, after the suit has abated against a defendant. In my view the order dated 13th January 2006 passed by the court dismissing as abated the suit against the deceased defendant no.4 would not come in the way of the court for granting to the plaintiff exemption from bringing the legal representatives of the deceased defendant no.4 on record.

9. However, what needs to be considered in the present case is whether the discretion conferred on the court under sub Rule 4 of Rule 4 of Order 22 of CPC should be exercised to grant an exemption to the plaintiff from substituting the legal representatives of the defendant no.4. It may be born in mind that the normal rule of any suit or a judicial proceeding is that a party should be heard before any order or judgment is passed against him. It is this requirement which is reflected in sub rule 1 of Rule 4 of Order 22 of the CPC which requires

legal representatives of the deceased defendant to be substituted in his place so that they have an opportunity of being heard. Sub rule 4 is an exception to sub rule 1, which empowers the court to dispense with the requirement of substituting the legal representatives of a deceased defendant. The power can be exercised only where the deceased defendant had not filed a written statement or after having filed it had failed to appear to contest the suit. It may be noted that even if the written statement is not filed, the defendant is entitled to appear and (without being entitled to adduce any evidence) is entitled to show that on the facts pleaded and proved by the plaintiff he is not entitled to a decree. Since even a defendant who has not filed a written statement in the suit has a right of cross examining the plaintiff 's witnesses, the permission of not substituting the legal representatives of the deceased defendant on record should not be granted lightly, because by grant of the permission the right of the legal representatives of being heard is hampered.

10. It may be noted that in the present case on 2nd September 2005 counsel for the plaintiff stated before the court that the defendant no.4 has expired and he wanted to take steps for substituting the legal representatives of the deceased defendant. Again on 16th December 2005 the counsel for the plaintiff stated that the plaintiff wanted to move a Chamber

Summons for substituting the legal representatives of the deceased defendant no.4. Thus the plaintiff had disclosed his unequivocal intention for bringing on record the legal representatives of the deceased defendant no.4, in consonance with the requirement of sub rule 1 of Rule 4 of Order 22 of the CPC. The plaintiff cannot turn back and now say that he should be exempted from bringing the legal representatives of the deceased defendant no.4 on record. This is not a fit case to exercise discretion under sub rule 4 of Rule 4 of Order 22 of the CPC.

11. For these reasons the Chamber Summons is allowed in part. The plaintiff is allowed to amend the plaint and the Chamber Summons is made absolute in terms of prayer clause (b). However, the rest of the prayers in Chamber Summons is rejected.

(D.G. KARNIK J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Chamber Summons No. 296 of 2006

in
Suit no. 3320 of 1985

RELIANCE CONSULTANCY SERVICES LTD. ... Plaintiff
V/S
METRO PALUTAN INVESTMENT AND ORS. .. Defendants

Mr. M.L. Palan i/b. DAVE AND CO., for plaintiff
None for defendants

CORAM: **D.G. KARNIK J**.

DATE: February, 5, 2007

For the reasons recorded separately the court passes the following order.:

> For these reasons the Chamber Summons is allowed in part. The plaintiff is allowed to amend the plaint and the Chamber Summons is made absolute in terms of prayer clause (b). However, the rest of the prayers in Chamber Summons is rejected.